IN THE SUPERIOR COURT OF BIBB COUNTY
STATE OF GEORGIA

SOUTHERN GUARANTY INSURANCE COMPANY OF GEORGIA,	94CV05311 D-3
Plaintiff,	CIVIL ACTION FILE NO.
v.	
SOUTHEASTERN EXPRESS SYSTEMS, INC., SOUTHEASTERN EXPRESS SYSTEMS, SOUTHEASTERN BROKERAGE COMPANY, SOUTHEASTERN EXPRESS, GEORGE BARNES, KEVIN CLARK, and GERRY WAMBOLT,	
Defendants.	

COMPLAINT FOR DECLARATORY JUDGMENT

(Filed June 9, 1994)

COMES NOW Southern Guaranty Insurance Company of Georgia, and pursuant to O.C.G.A. § 9-4-1, *et seq.*, brings this Complaint for Declaratory Judgment and shows this Honorable Court as follows:

1.

The Plaintiff brings this Complaint for Declaratory Judgment pursuant to Georgia law because there is an actual controversy of a justiciable nature between the Plaintiff and the Defendants involving the rights and

liabilities of the parties concerning policies of insurance issued by the Plaintiff to the Defendants George Barnes d/b/a Southeastern Brokerage Company and Southeastern Express Systems, Inc., which must be resolved by this Court.

2.

The Defendant Southeastern Express Systems, Inc. is a Georgia corporation with its place of business located at 151 College Street, Macon, Georgia 31210, having its registered agent for service as George A. Barnes, and is subject to the jurisdiction of this Court.

3.

The Defendant George A. Barnes is a resident of Bibb County, and resides at 106 Kenilworth Court, Macon, Georgia 31210, and is subject to the jurisdiction of this Court.

4.

The Defendant Gerry Wambolt is a resident of Bibb County, and resides at 580 Rogers Drive, Macon, Georgia 31210, and is subject to the jurisdiction of this Court.

5.

The Defendant Kevin Clark is a resident of Bibb County, and resides at 104 Carriage Lakes Court, Macon, Georgia 31210, and is subject to the jurisdiction of this Court.

6.

The Defendants Barnes, Wambolt, and Clark are partners, and do business as Southeastern Express Systems and/or Southeastern Express and/or Southeastern Brokerage Company, with its principal place of business at 151 College Street, Macon, Georgia 31210.

7.

Venue and jurisdiction are proper in this Court.

8.

On April 22, 1992, Triad Systems Corporation (Triad), a Delaware Corporation with its principal place of business in Livermore, California, filed suit against Defendants Southeastern Express Systems, Inc. and George Barnes in the United States District Court in the Northern District of California. Subsequently, Triad amended its Complaint and added the Defendants Southeastern Express Co., Southeastern Brokerage Company, Southeastern Systems, Kevin Clark, and Gerry Wambolt. Triad's Complaint alleges, *inter alia*, the following:

Paragraph 22: That the Defendants sold pre-owned Triad hardware and software to third parties without Triad's receipt of the software relicensing fee and without obtaining the transferee's agreement to be bound by Triad's license agreement, that Defendants knew of the Triad original customer's obligation to pay the relicensing fee and to refrain from transferring the software without a license agreement and Defendants intentionally

encouraged Triad's original customers to violate the licensing agreements.

Paragraph 23: That Defendants provided their customers with copies of Triad's manuals which were copyrighted and contained proprietary material without first obtaining permission from Triad in violation of the copyright laws.

Paragraph 24: That the Defendants provided to their customers upgraded versions of the Triad software without obtaining a license from Triad or paying any licensing or relicensing fee to Triad.

Paragraph 25: That the Defendants provided its customers illegal copies of Triad's copyrighted software programs.

Paragraphs 27-31: That the Defendants each breached the confidentiality agreements entered into with Triad by wrongfully disclosing Triad's proprietary information and using such information in competition with Triad.

Paragraphs 32-41: That the Defendants misappropriated Triad's proprietary property (information regarding the operation and service of Triad's hardware and software and the information contained in Triad software) by transferring, selling and using the proprietary property without Triad's consent.

Paragraphs 42-44: That the Defendants have violated the California Business and Professions Code by: misappropriating Triad's trade secrets, by soliciting actual and potential customers of Triad by advertising Defendants' familiarity with Triad's proprietary property, by inducing Triad's customers to violate their licensing agreements

and transferring software in violation of their licensing agreements.

Paragraphs 45-51: That Defendants intended by their actions to interfere with the service and licensing agreements between Triad and their customers in order to intentionally acquire Triad's customers.

Paragraphs 52-60: That Defendants, with full knowledge of Triad's relationships with its current and potential customers, intended to interfere with these relationships for the purpose of depriving Triad of its rights under its licensing agreements with the intent that Triad's customers would become the customers of the Defendants.

Paragraphs 61-70: That Defendants wilfully infringed on Triad's copyrighted software by making and using illegal copies for their own commercial purposes and economic benefit, to solicit customers and to prevent Triad from using these works in Triad's own business.

9.

A true and correct copy of the Complaint and Amended Complaint are attached hereto as Exhibits "A" and "B" and incorporated herein by reference.

10.

Triad's Complaint seeks actual money damages, preliminary and permanent injunctions, statutory damages for copyright infringement, punitive damages, and attorney's fees.

11.

The Plaintiff issued a policy of insurance to George Barnes d/b/a Southeastern Brokerage Co., policy no. BPO 6450, with effective dates of coverage from October 25, 1989, to October 25, 1990.

12.

A true and accurate copy of policy no. BPO 6450, with effective dates of coverage from October 25, 1989, to October 25, 1990 is attached hereto as Exhibit "C" and incorporated herein by reference.

13.

The Plaintiff subsequently issued policy no. BPO 9896, with effective dates from October 25, 1990 to October 25, 1991.

14.

A true and accurate copy of policy no. BPO 9896, with effective dates from October 25, 1990 to October 25, 1991 the policy is attached hereto as Exhibit "D" and incorporated herein by reference.

15.

Policy no. BPO 9896 also lists George Barnes d/b/a Southeastern Brokerage Co. as the named insured and has been renewed on a yearly basis. When this policy was renewed effective October 25, 1992, the policy listed the named insured as Southeastern Express Systems, Inc.

16.

Under the provisions of the referenced policies, the insured was provided with general liability coverage subject to the terms and conditions of the policy.

17.

Policy no. BPO 6450 defines "insured" as follows:

"Insured means each of the following to the extent set forth below:

a. If the named insured is designated in the declarations as an individual, the person so designated but only with respect to the conduct of a business of which he is the sole proprietor and the spouse of the named insured with respect to the conduct of such a business;"

18.

Policy no. BPO 6450 provides coverage as follows:

"SECTION 2 – COMPREHENSIVE BUSINESS LIABILITY

COVERAGE E
BUSINESS
LIABILITY

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, property damage or personal injury caused by an occurrence to which this insurance applies."

19.

Policy no. BPO 6450 defines "bodily injury", "personal injury" and "occurrence" as follows:

> "Bodily injury means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom;"
>
> "Personal injury means injury which arises out of one or more of the following offenses committed in the conduct of the named insured's business:
>
> a. False arrest, detention or imprisonment or malicious prosecution;
>
> b. The publication or utterance of a libel or slander or of other defamatory or disparaging material, or a publication or utterance in violation of an individual's right of privacy; except publications or utterances in the course of or related to advertising, broadcasting or telecasting activities conducted by or on behalf of the named insured;
>
> c. Wrongful entry or eviction, or other invasion of the right of private occupancy;"
>
> "Occurrence means an accident, including continuous or repeated exposure to conditions, which results in bodily injury and property damage neither expected nor intended from the standpoint of the insured and with respect to personal injury, the commission of an offense or a series of similar or related offenses;"

20.

Policy no. BPO 6450 provides the following exclusion:

BUSINESS
LIABILITY
EXCLUSIONS Under Coverage E, this policy does not apply:

4. to liability assumed by the insured under any contract or agreement except a contract as defined in this policy;

The policy defines "contract" as follows:

"Contract means any written contract or agreement wherein the named insured has expressly assumed liability for damages to which this policy applies, . . .

21.

Policy no. BPO 6450 also provides the following exclusion:

"2. Personal injury arising out of any publication or utterance described in Item B of the definitions of personal injury:

a. If the first injury is publication or utterance of the same or similar material by or on behalf of the named insured was made prior to the effective date of this insurance; or

b. Concerning any organization or business enterprise or its products or services made by or at the direction of any

insured with knowledge of the falsity thereof."

22.

Policy no. BPO 9896 defines "insured" as follows:

C. WHO IS AN INSURED

1. If you are designated in the Declarations as:

a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.

b. A partnership or joint venture, you are an insured. Your members, your partners and their spouses are also insureds, but only with respect to the conduct of your business.

2. Each of the following is also an insured:

Your employees, other than your executive officers, but only for acts within the scope of their employment by you. . . .

23.

Policy no. BPO 9896 provides coverage as follows:

"A. Coverages

1. Business Liability

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury, property damage, personal injury or advertising injury to which this insurance applies. . . .

b. This insurance applies:

(2) To:

(a) Personal injury caused by an offense rising out of your business excluding advertising, publishing, broadcasting or telecasting done by or for you;

(b) Advertising injury caused by an offense committed in the course of advertising your goods, products or services; but only if the offense was committed in the coverage territory during the policy period."

24.

Policy no. BPO 9896 defines "advertising injury" as follows:

"Advertising injury" means injury arising out of one or more of the following offenses:

a. Oral or written publication of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

b. Oral or written publication of material that violates a person's right of privacy;

c. Misappropriation of advertising ideas or style of doing business; or

d. Infringement of a copyright, title or slogan."

25.

Policy no. BPO 9896 provides the following exclusion:

> B. EXCLUSIONS
>
> 1. Applicable to Business Liability Coverage – This insurance does not apply to:
>
> p. "Personal injury" to "advertising injury":
>
> 1. Arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity;
>
> 2. Arising out of oral or written publication of material whose first publication took place before the beginning of the policy period; . . .
>
> q. "Advertising injury" arising out of:
>
> (1) Breach of contract, other than misappropriation of advertising ideas under an implied contract;

26.

Policy no. BPO 9896 provides various conditions which must be fulfilled by the insured as follows:

> 2. Duties in the event of an occurrence, claim or suit
>
> b. If a claim is made or suit is brought against any insured, you must:

(1) Immediately record the specifics of the claim or suit and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or suit as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or suit;

d. No insureds will, except at their own cost, voluntarily make a payment, assume any obligation, or incur any expense, . . . , without our consent."

27.

As stated above, Triad has filed a lawsuit styled *Triad Systems Corporation v. Southeastern Express Co., a Georgia de facto partnership dba Southeastern Brokerage Company and dba Southeastern Systems; Southeastern Express Systems, Inc., a Georgia corporation; Georgie Barnes, an individual; Kevin Clark, an individual; and Gerry Wambolt, an individual,* which is pending in the United States District Court, Northern District of California, Civil Action File No. C92 1539 FMS and Defendants have asserted entitlement to certain benefits under the above referenced insurance contracts issued by the Plaintiff.

28.

In accordance with the terms of Plaintiff's above referenced policies, Plaintiff shows that it is uncertain as to whether some and/or all of the Defendants qualify as "insureds" under the policies.

29.

In accordance with the terms of Plaintiff's above referenced policies, Plaintiff is uncertain that the allegations made by Triad against the Defendants are covered under the terms of the Plaintiff's policies because they do not constitute "bodily injury", "personal injury", or "advertising injury" under the policy; nor did they arise out of an "Occurrence." In addition, any claims that would be covered under Plaintiff's policies may be excluded because the insured has failed to comply with the notice provisions of the policies. Therefore, the Plaintiff is left uncertain as to its rights and obligations with regard to any insurance coverage applicable to claims arising out of the contract entered into between the Defendants.

WHEREFORE, Plaintiff Southern Guaranty Insurance Company of Georgia prays this Honorable Court grant the following relief:

1. A declaratory judgment regarding the rights and obligations of the parties herein, declaring that Plaintiff's coverage is not applicable to the occurrences complained of by Triad against the Defendants; and

2. That this Court grant to the Plaintiff such other and further relief as the Court deems just, equitable and proper.

Respectfully submitted,

CHAMBERS, MABRY,
McCLELLAND & BROOKS

/s/ Robert M. Darroch
ROBERT M. DARROCH
State Bar No. 0205490

/s/ Vincent A. Toreno
VINCENT A. TORENO
State Bar No. 714735

[Exhibits A-D Omitted In Printing]